EXHIBIT A

2.9. DEFINITIONS (continued)

Central Office - a Local Exchange Company location from which it furnishes telecommunications services. Sx ..

Channel - an electrical transmission path for communications between two points.

Charge Number - refers to the delivery of the calling party's billing number in a Signaling System 7 environment by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users.

Company - American Telephone and Telegraph Company, Interstate Division (AT&T Communications), its Concurring Carriers, Connecting Carriers, and its Other Participating Carriers, either individually or collectively. .. Sx

Component - a basic element used to provide WATS.

Connecting Arrangement - the equipment provided by the Company for the direct electrical connection of Customer Equipment to AT&T 800 Service or AT&T WATS.

Conversion - a Customer request to (1) change to a different service area, (2) change of the AT&T 800 Service telephone number, or (3) separating or combining AT&T 800 Service hunting arrangements.

Country Access Capability - a term that denotes the overseas network control arrangement which allows a Customer to subscribe to AT&T 800 Service-Overseas from a given overseas country and specify the number of simultaneous calls which this Company will attempt to complete from that country to a service group.

Customer - **the person or legal entity which orders service (either directly or through an agent).**

Customer Equipment - terminal equipment, a multiline terminating system or protective circuitry located at a non-Company premises. Sx ..

Customer Premises - a location where service is terminated. It includes the premises of a Customer or User.

Customer-Provided Communications System - Customer-provided dedicated private line channels and equipment (e.g., microwave or cable system) furnished for communications between premises.

Customer-Provided Test Equipment - non-Company Customer test equipment which is located at the Customer's premises and used for the detection and/or isolation of a communications service fault. .. Sx

x Material filed under Transmittal No. 9808 is deferred to April 11, 1996 under authority of Special Permission No. 96-0346.

EXHIBIT B

JURISDICTION

The Federal Communications Commission ("FCC") issued its Memorandum Opinion and Order, *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, File No. CCB/CPB 96-20 (Oct. 17, 2003) ("*Declaratory Ruling*") (JA ____), on October 17, 2003. Pursuant to 47 U.S.C. § 402(a), AT&T filed a timely petition for review of that final order on December 1, 2003.

ISSUE PRESENTED

Whether the FCC's *Declaratory Ruling* is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

RELEVANT STATUTES AND REGULATIONS

Section 203(c) of the Communications Act, 47 U.S.C. § 203(c), provides:

> (c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall . . . (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT OF THE CASE

This is an appeal from a *Declaratory Ruling* of the FCC that held (1) that AT&T's 800 service tariff provided it with no protection against what the FCC assumed was a scheme to defraud AT&T out of tariffed charges for its service and (2) that AT&T's attempt to protect itself was therefore a violation of Section 203(c) of the Communications Act.

During the period at issue, AT&T's 800 service was provided under a tariff that allowed the "transfer or assignment" of 800 service to a new customer only if the new customer "agrees to assume all obligations of the [existing] customer at the time of the transfer." AT&T's tariff

EXHIBIT C

experiencing whatever delays arose in filling the order.

3. The Inga Companies-CCI-PSE Transactions. Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., and 800 Discounts, Inc. were all formerly resellers of AT&T's 800 services under nine CSTP II plans. These companies are referred to collectively as the "Inga Companies" because they were all owned and controlled by Mr. Alfonse Inga. *Id.* at ¶ 1.

The Inga Companies had committed to aggregate $54 million per year of inbound WATS services under the nine CSTP II plans that are the subject of this proceeding. *Id.* at ¶ 2. This volume of traffic qualified for a discount of 28 percent off AT&T's regular tariffed rates, consisting of a 23 percent discount under the CSTP II plan and an additional 5 percent discount under AT&T's tariffed Revenue Volume Pricing Plan ("RVPP"). *Id.*

In October 1994, the Inga Companies and a newly formed company, Combined Companies, Inc. ("CCI"), entered into a contract which provided, among other things, for transfers of the Inga Companies' 800 service to CCI and then to another reseller, Public Service Enterprise, Inc. ("PSE"). *See Declaratory Ruling* ¶¶ 3-4. First, the Inga Companies agreed to transfer, using AT&T's "Transfer of Service Agreement" ("TSA") forms, all their CSTP II plans to CCI in exchange for 80 percent of the larger discounts that CCI expected to obtain from AT&T as a result of the larger volume of traffic that CCI hoped to have when it consolidated the plans of the Inga Companies with the plans of other resellers. *Id.* at ¶ 3. Second, the Inga Companies and CCI agreed that CCI would use its best efforts to consolidate the nine CSTP II plans into a new contract tariff to be negotiated by CCI with AT&T or, if those negotiations were unsuccessful, to place the traffic associated with the transferred plans onto an existing Contract

---

covers its expenses and provide itself with a profit.

EXHIBIT D

Tariff No. 516 ("CT 516") between AT&T and PSE. *Id.* at ¶ 4.[5]

In December 1994, the Inga Companies and CCI executed and submitted to AT&T nine Transfer of Service Agreement forms requesting that AT&T permit the transfer of the nine Inga Companies' CSTP II plans to CCI. Pursuant to § 2.1.8 of AT&T's Tariff, CCI agreed to assume all the liabilities associated with the Inga Companies' 800 service. *See Declaratory Ruling* ¶ 3. AT&T initially objected to the transfer of these plans to CCI unless CCI provided a security deposit because CCI was a new company with no assets, no credit history, and no prior dealings with AT&T. However, the transfer to CCI was subsequently effected without a deposit pursuant to a May 19, 1995 order of the United States District Court for the District of New Jersey.[6] As a result, the Inga Companies' nine CSTP II plans were transferred to CCI, and the FCC assumed for purposes of its *Declaratory Ruling* that "CCI was the legitimate transferee of the Inga Companies' CSTP II/RVPP plans and the customer of AT&T." *Declaratory Ruling* ¶ 3 & n.19.[7]

It is the second proposed transfer of the 800 service associated with the nine CSTP II plans that is the subject of the FCC's *Declaratory Ruling*. On January 13, 1995, after CCI was unable to negotiate its own new contract tariff with AT&T, CCI and PSE jointly executed and submitted to AT&T nine "Transfer of Service Agreement" forms, one for each of the nine CSTP II plans, requesting AT&T to transfer "all BTNs" or billed telephone numbers for each plan (with two specified exceptions for each plan) from CCI to PSE. *See Declaratory Ruling* ¶ 4;

---

[5] By its terms, CT 516 was available to any similarly situated customer for a period of 90 days following the October 20, 1993 effective date of the tariff. CT 516, § 6.I. Because that 90-day availability period had expired in January 1994, the Inga Companies and CCI were no longer eligible to subscribe directly to CT 516.

[6] Declaratory Ruling, ¶¶ 3, 5; Letter Order, *Combined Companies, Inc. v. AT&T Corp.*, Civil Action No. 95-908 (D.N.J. filed May 19, 1995) ("*First District Court Opinion*"), Exhibit B to Petition for Declaratory Ruling (JA____).

[7] *See also AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd 16,074, ¶¶ 7, 11 (2001) (finding that all of Winback & Conserve's customers were transferred to CCI when its CSTP II plans were transferred to CCI pursuant to their December 1994 agreement, and that

EXHIBIT E

Transfer of Service Agreement and Notification forms, Exhibit H to Petition for Declaratory Ruling (JA ___). At the bottom of each of these transfer of service forms, a handwritten notation requested that AT&T move the "traffic only" on each plan from CCI to PSE and keep the plan itself, including all associated commitments and liabilities, with CCI. *Id.* CCI and PSE thereby sought to move all of the revenue producing telephone numbers in the nine CSTP II plans to PSE, but leave all of the obligations arising under those plans with CCI.

AT&T denied this second proposed transfer to PSE on January 27, 1995. AT&T objected to this requested transfer of telephone numbers to PSE without the associated CSTP II plans on two grounds.[8] First, the "Transfer or Assignment" provision in Section 2.1.8 of AT&T's tariff did not allow the transfer of WATS service to a new customer unless the new customer agreed to assume "all obligations" of the former customer, which PSE had not done. *See Declaratory Ruling* at n.26. Second, AT&T objected that the proposed "traffic only" transfer violated the "Fraudulent Use" provision in Section 2.2.4 of the tariff. In particular, because CCI would have transferred all the revenue producing telephone numbers to PSE without any of the accompanying obligations of the customer under the CSTP II plans, and because CCI would have had no revenue or other means of meeting its obligations under those plans, the proposed transfer had the purpose and effect of avoiding, in whole or in part, liability for tariffed shortfall and/or early termination charges under the plans. *Id.*

4. The Proceedings Below. In February 1995, the Inga Companies and CCI brought suit against AT&T in the United States District Court for the District of New Jersey and challenged AT&T's refusal to effect either of the proposed transfers. *See Declaratory Ruling* ¶

"after that date, [Winback & Conserve] ceased to provide interstate communications services").

[8] AT&T also initially objected to this transfer on the ground that CCI was not the customer of record for the plans, and hence was not authorized to transfer the traffic. *Declaratory Ruling* ¶ 4. That objection was mooted when the plans were transferred from the Inga Companies to CCI.

EXHIBIT F

Transfer of Service Agreement and Notification forms, Exhibit H to Petition for Declaratory Ruling (JA ___). At the bottom of each of these transfer of service forms, a handwritten notation requested that AT&T move the "traffic only" on each plan from CCI to PSE and keep the plan itself, including all associated commitments and liabilities, with CCI. *Id.* CCI and PSE thereby sought to move all of the revenue producing telephone numbers in the nine CSTP II plans to PSE, but leave all of the obligations arising under those plans with CCI.

AT&T denied this second proposed transfer to PSE on January 27, 1995. AT&T objected to this requested transfer of telephone numbers to PSE without the associated CSTP II plans on two grounds.[8] First, the "Transfer or Assignment" provision in Section 2.1.8 of AT&T's tariff did not allow the transfer of WATS service to a new customer unless the new customer agreed to assume "all obligations" of the former customer, which PSE had not done. *See Declaratory Ruling* at n.26. Second, AT&T objected that the proposed "traffic only" transfer violated the "Fraudulent Use" provision in Section 2.2.4 of the tariff. In particular, because CCI would have transferred all the revenue producing telephone numbers to PSE without any of the accompanying obligations of the customer under the CSTP II plans, and because CCI would have had no revenue or other means of meeting its obligations under those plans, the proposed transfer had the purpose and effect of avoiding, in whole or in part, liability for tariffed shortfall and/or early termination charges under the plans. *Id.*

4. The Proceedings Below. In February 1995, the Inga Companies and CCI brought suit against AT&T in the United States District Court for the District of New Jersey and challenged AT&T's refusal to effect either of the proposed transfers. *See Declaratory Ruling* ¶

"after that date, [Winback & Conserve] ceased to provide interstate communications services").

[8] AT&T also initially objected to this transfer on the ground that CCI was not the customer of record for the plans, and hence was not authorized to transfer the traffic. *Declaratory Ruling* ¶ 4. That objection was mooted when the plans were transferred from the Inga Companies to CCI.

EXHIBIT G

> Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s).[13]

The FCC here agreed with AT&T that this section did not require the proposed transfer from CCI to PSE. The FCC stated, correctly, that "section 2.1.8 of AT&T's tariff provided that a customer could transfer 'WATS' to a 'new customer' *only if* the new customer confirmed in writing that it agrees to assume all obligations of the former customer at the time of transfer or assignment." *Declaratory Ruling*, ¶ 9 (emphasis added). The FCC further acknowledged that PSE had not assumed these liabilities, for PSE sought transfer of only the 800 services provided (the "end user traffic") and had not assumed the "plan's" term and volume commitments and associated termination and shortfall liabilities.

However, the FCC went on to hold that Section 2.1.8 somehow "did not address – and therefore did not preclude or otherwise govern – the movement of traffic from one aggregator to another [that] CCI and PSE sought to effect in this case." *Id.* That is plainly wrong. What PSE and CCI here sought to "effect" was a transfer or assignment of existing 800 services under Section 2.1.8. That is conclusively established by the fact that CCI and PSE sought to implement the proposed transfer by using the AT&T "Transfer of Service Agreement" form, which was specifically designed for transfers of service under Section 2.1.8 of the tariff and repeated the requirements of that tariff provision.[14] Further, that the proposed transfer from CCI to PSE did not meet the requirements of Section 2.1.8 is confirmed by the fact that CCI and PSE had to modify the standard form by adding handwritten notations requesting AT&T to move the

---

[13] AT&T Tariff FCC No. 2, § 2.1.8, 14th revised p. 20 (effective April 21, 1994), Exhibit I to Petition for Declaratory Ruling (JA ____), quoted in *Declaratory Ruling* at n.46 (emphasis added).

[14] *See* Transfer of Service Agreement and Notification forms, Exhibit H to Petition for Declaratory Ruling (JA ___).

"traffic only" for each of the telephone numbers that they sought to transfer while leaving the associated CSTP II plans and their attendant obligations "intact" with CCI.

Nonetheless, the FCC appears to have held (perversely) that the proposed CCI-to-PSE transfer was not subject to Section 2.1.8 precisely because PSE and CCI had not satisfied the tariff's express precondition to a transfer: that PSE assume the associated liabilities. In particular, the FCC's apparent view is that there was no "transfer" of 800 service under Section 2.1.8 because PSE and CCI said that they were transferring only "end user traffic" and that CCI would continue to be liable for the tariff's term and volume commitments.

This is nonsense. A transfer of the "end user traffic" under the plans is a transfer of the *800 Services* provided under the plans. "End user traffic" – *i.e.*, the calls placed to an end user location – exists only because 800 numbers were associated with the end user locations and 800 service had otherwise been established for those locations. The transfer of the "traffic" thus *requires* a transfer of the 800 Service (and the associated 800 numbers). In this regard, CCI and PSE expressly requested that (with two exceptions) all the underlying 800 numbers ("the BTNs," *i.e.*, Billed Telephone Numbers) and the responsibility for 800 service to end user locations under each plan be transferred to PSE, and CCI and PSE attempted to effectuate that request by using AT&T's Section 2.1.8 "transfer of service" forms. In short, PSE and CCI plainly requested a transfer of inbound "WATS, including the associated telephone numbers" under Section 2.1.8, and under the terms of the tariff, this proposed transfer could not occur unless CCI's liabilities were also transferred and assumed by PSE – as they concededly were not.

Beyond that, under the FCC's holding, Section 2.1.8 would serve no purpose at all, contrary to the rule against construing contract or tariff provisions to be nullities or to create absurdities. In particular, while the FCC acknowledged that the proposed service transfers to

EXHIBIT H

In its opening brief, AT&T showed that the FCC's construction of both of the two tariff provisions at issue is plainly wrong. The FCC's construction is not supported by – and, indeed, is directly contradicted by – the language of the tariff, and the FCC's construction would produce absurd results. AT&T Br. 17-29. AT&T also demonstrated that there was no evidentiary support for a critical FCC finding. AT&T thus raised no new questions of fact or law that the FCC had not already had an "opportunity to pass" upon. Rather, AT&T relied on the same undisputed facts and the same undisputed tariff language that the FCC had already had a full opportunity to address in its decision. Accordingly, there is no Section 405 preclusion.

II. THE FCC CLEARLY ERRED AND OTHERWISE ACTED ARBITRARILY IN HOLDING THAT AT&T'S TARIFF PERMITS TRANSFERS OF 800 SERVICE WITHOUT THE ASSOCIATED LIABILITIES

There are three separate reasons why the FCC committed reversible error in holding that AT&T's tariff permitted the transfer of the "traffic" from 800 service plans without the associated liabilities. First, the holding that Section 2.1.8 of the tariff does not "address or govern" such transfers is clearly erroneous under the plain language of this provision. Second, the FCC's interpretation of the tariff renders Section 2.1.8 meaningless and absurd. Third, the FCC's conclusion rests on findings that are not supported by any evidence, much less substantial evidence. The FCC's Brief has simply refused to confront most of these points, and its has no substantial response to any of them.

1. Contrary to the *Order's* holding, Section 2.1.8 squarely "address[es]" and "govern[s]" any transfer or assignment of "WATS, including any associated telephone numbers." It provides that such transfers can occur only if ("provided that") the transferee (here PSE) agrees in writing to assume "(1) all outstanding indebtedness for the service at issue and (2) the unexpired portion of applicable minimum service periods." Here, it was undisputed that PSE did not assume these obligations. Accordingly, the FCC acknowledged that Section 2.1.8 would

EXHIBIT I

section 2.1.8 . . . permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction." *Order*, ¶ 1 (citation omitted) (bracketed language in original). Indeed, the *Order* elsewhere expressly states that "[i]n court and before the Commission, AT&T argues that § 2.1.8 of the Tariff No. 2 did *not* authorize the transfer of traffic without a plan unless the transferee assumed the original customer's liability." *Id.*, ¶ 9 (emphasis added).

The FCC's contrary claims rest on its mischaracterization of a single sentence from AT&T's Opposition below, which stated: "Section 2.18.B states that a customer may transfer its WATS service (in this case the relevant WATS services are the CSTP II Plans) to a 'new Customer' only if the new customer confirms in writing that it 'agrees to assume *all* obligations of the former Customer at the time of transfer or assignment.'" AT&T Opposition, pp. 10-11 (JA___). This sentence did *not* distinguish between "traffic" and the "plans." Rather, after stating that "in this case the relevant WATS services are the 'CSTP II Plans,'" it distinguished these "services" from the "obligations" of the former customer. Even when viewed in isolation, this sentence did not state that Section 2.1.8 applies "only" to transfers of entire plans (with associated obligations) and not to transfers of the traffic alone (without these obligations). Rather, the sentence says precisely the opposite.

Further, when viewed in the context of the paragraph in which this sentence appears, AT&T made it perfectly clear that its position was and is that the proposed transfer of end user 800 "locations" and their "traffic only" – without the associated "obligations under those same plans" – violates Section 2.1.8. The paragraph in its entirety states as follows:

> "CCI ostensibly sought to transfer the traffic – but not the plans themselves – to PSE under Section 2.1.8 of AT&T's Tariff F.C.C. No. 2. Section 2.18.B states that a customer may transfer its WATS service (in this case the relevant WATS services are the CSTP II Plans) to a 'new Customer' only if the new customer confirms in writing

EXHIBIT J

the transferee voluntarily to assume these liabilities. Under the FCC's holding, therefore, Section 2.1.8 serves no purpose and is a nullity, contrary to settled principles of contract and tariff interpretation.

There is no substance to the FCC's argument that Section 405(a) bars consideration of this claim. The claim is the "necessary implication" of AT&T's argument below that the tariff prohibits service transfers when the associated liabilities are not assumed. *Time Warner*, 144 F.3d at 80. By pointing out the illogical consequence of the FCC's ruling, AT&T is not relying on a new "question of fact of law," but merely demonstrating that the "reasoning" in the FCC's *Order* is "invalid" (*MCI*, 10 F.3d at 845-46) and that the FCC's answer to the "original question" posed by the Third Circuit was "incorrect[ ]." *Time Warner*, 144 F.3d at 80.

The FCC's other arguments intentionally miss the point. The FCC makes tortured arguments that parties' rights and liabilities are different when service is transferred with the associated liabilities than when service is transferred without them. FCC Br. 19. This is true, but irrelevant. The point is that, under the FCC's construction of AT&T's tariff, Section 2.1.8 serves no purpose, for transfers of service are otherwise permitted under the tariff, whether or not the obligations associated with the service are assumed in accordance with the requirements of Section 2.1.8.B. The illogic of the FCC's reasoning confirms that Section 2.1.8 permits transfers of service only if the associated liabilities are assumed by the new customers.

The absurdity of the FCC's interpretation is further confirmed by the result it would achieve when there is an outstanding indebtedness at the time the transfer of service is proposed. Under the plain terms of Section 2.1.8, the new customer is required to assume the outstanding debt, enabling AT&T to threaten to suspend or disconnect service if the debt is not paid. By

---

restrict the number portability rights of end users.